

Ethical and Risk-management Issues in Behavioral Health

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Evolution of Ethics in the Human Services

- Morality period (late 19th century to early 20th century)
- Values period (early 20th century to 1970s)
- Ethical dilemmas and decision-making period (late 1970s to present)
- Ethics risk-management period (early 1990s to present)
- Digital period (2010-ish to present)

Core Knowledge

- **Ethical dilemmas:** Conflicts among competing obligations and duties
- **Ethical decision-making:** How we approach making challenging ethical decisions
- **Ethics risk management:** Taking practical steps to
 - Protect clients
 - Prevent lawsuits (litigation)
 - Prevent ethics complaints

Potential Ethics Risks

- **Ethical mistakes:** Inadvertent errors (otherwise known as *Oops!*)
- **Deliberate ethical decisions:** Making ethical decisions in a way that is designed to protect clients, practitioners, employers, and other parties
- **Ethical misconduct:** Violations of prevailing ethical standards

Key Risk Areas

- Client rights
- Confidentiality and privacy
- Informed consent
- Service delivery
- Boundary issues and conflicts of interest
- Digital and social media
- Documentation
- Defamation of character
- Client records
- Supervision
- Staff development and training
- Consultation
- Client referral
- Fraud
- Termination of services and client abandonment
- Practitioner impairment
- Evaluation and research

Standard of Care

“What a *reasonable* and *prudent* professional, with the same or similar training, would have done under the same or similar circumstances.”

Standards of Care

- Substantive standard of care
- Procedural standard of care (see Reamer, 2015)
 - Consult colleagues and supervisors
 - Review relevant ethical standards
 - Review relevant laws, policies, and regulations
 - Review relevant practice standards
 - Review relevant literature
 - Obtain legal consultation, when necessary
 - Consult ethics committee, if available
 - Document decision-making steps

Types of Laws

- Regulatory law (executive branch)
- Statutory law (legislative branch)
- Case law (judicial branch)
- Constitutional law

Professional Negligence

- A duty exists
- Dereliction or breach of the duty
- Damage or injury
- Causal connection between the breach of the duty and the damage or injury (proximate cause or “cause in fact.”)

Forms of Negligence

- **Misfeasance:** Commission of a proper act in a wrongful or injurious manner or the improper performance of an act that might have been performed lawfully.
- **Malfeasance:** Commission of a wrongful or unlawful act.
- **Nonfeasance:** The failure to perform an act that is part of one's responsibility.

Intentional Disclosure

- | | |
|--|--------------------------------------|
| • Duty to protect/warn | • Group counseling |
| • Mandatory reporting | • Self-help groups |
| • 42 CFR Part II | • Minors |
| • FERPA: Family Education Rights & Privacy Act | • Bill collection |
| • HIPAA: Health Insurance Portability and Accountability Act | • Deceased clients |
| • Disclosure: Other agencies | • Sexual misconduct by professionals |
| • Disclosure: Within agencies | • News media |
| • Peer Consultation | • Law enforcement |
| | • Interns |
| | • Personal notes |

Unintentional Disclosure

- | | |
|-----------------|---------------------------|
| • Waiting rooms | • Cellular telephones |
| • Hallways | • Fax and voicemail |
| • Desk | • Internet Communications |
| • Office phone | • Computer Screen |
| • Office notes | • Envelope return address |
| • Elevators | • Bus, Train, Plane |
| • Restaurants | |
| • Photocopies | |

Duty to Protect

- Threat of violence
- Foreseeable threat
- Imminent threat
- Identifiable potential victim

Informed Consent

- Voluntary and informed
- Content of Form
- Process

Content of Form

- Detailed statement of purpose
- Right to refuse and Withdraw
- Reasonable alternatives
- Costs/Benefits
- Jargon
- Blank forms
- Exceptions: Emergency, Therapeutic privilege, client waiver
- Expiration date
- Acknowledgment statement

Process

- Competence
- Verbal explanation
- Opportunity for Q&A
- Language barriers

Defamation of Character

- Libel (written) and slander (verbal)
- Key elements
 - Untrue statements
 - Knowingly untrue or should have known to be untrue
 - Damage or injury

Subpoenas

- Subpoena *duces tecum*; Subpoena *ad testificandum*
- Possible responses:
 - Motion to quash
 - Motion for protective order
 - Request for finding of relevance (“in camera” review)
 - Request to modify subpoena
 - Object to subpoena

Negligent Intervention

- High-risk techniques
- Inadequate training or expertise

Boundary Issues

- Types of dual or multiple relationships
 - Intimate relationships
 - Personal benefit
 - Emotional and dependency needs
 - Altruism
 - Unavoidable and unanticipated circumstances
- “Red Flags”
 - Objectifying client
 - Impulsive actions
 - Self-gratification

Supervision

- Key concepts: *Respondet Superior* and vicarious liability
- Key elements:
 - Content of supervision
 - Frequency of supervision
 - Duration of supervision
 - Boundaries between supervisor and supervisee
- Documentation

Termination of Services

- The concept of abandonment
- Guidelines to protect clients and minimize risk

Guidelines to Protect Clients and Minimize Risk

- Provide clients with names, addresses, and telephone numbers of at least 3 appropriate referrals when it is necessary to terminate.
- Follow up with a client who has been terminated. If the client does not go to the referral, write a letter to him or her about relevant risks.
- Provide as much advance warning as possible
- When clients announce their decision to terminate prematurely, explain risks involved and suggestions for alternative care. Include this information in a follow-up letter.

Guidelines to Protect Clients and Minimize Risk (cont'd)

- Carefully document in the case record all decisions and actions related to termination.
- In cases involving discharge from residential facilities, prepare a comprehensive discharge plan and notify significant others (inform clients of this.)
- Provide clients with clear instructions to follow in the event of an emergency. Ask clients to sign a copy acknowledging receipt and that the instructions were explained to them.

Guidelines to Protect Clients and Minimize Risk (cont'd)

- When leaving an employment setting, inform clients of appropriate options for continuation of services (e.g., transfer or continuation) and related benefits and risks.
- Consult with colleagues and supervisors about termination strategy and decisions.
- Consult relevant Code of Ethics standards.

Documentation: Key Issues

- The role of documentation and case recording in professional practice
 - Assessment
 - Planning and delivering services
 - Accountability: Clients, insurers, agencies, other providers, courts, utilization review
 - Continuity and coordination of services
 - Supervision
 - Evaluation of services

Documentation Guidelines

- Content of documentation: Key elements
- Amount: Too little, too much
- Wording: Precision, specificity, and ambiguity
- Defamation of character
- Avoid abbreviations unless approved list
- Print or write legibly
- Do not use dittos, erasures, or “white out”
- Do not document interventions before they occur
- Document in a timely fashion

Documentation Guidelines (cont'd)

- Do not display bias
- Avoid "It seems," "I believe," "I suppose," "It appears,"
- Avoid broad characterizations: "poor outcome," "good result," "moderate compliance," "drunk," "aggressive," "combative"
- Document what you know, not what you think
- Do not "over document" in a crisis
- Avoid documenting professional disagreements (jousting)

Documentation Guidelines (cont'd)

- Do not document staffing problems, interdepartmental issues
- Do not tamper with or alter records
- Use correct grammar and spelling (credibility issue)
- Client access to records
- Confidentiality and releases
- Privileged communication
- Personal notes
- Subpoenas

Ethics Committees

- Advisory v. Deliberative
- Functions
 - Case Consultation
 - Retrospective
 - Concurrent
 - Prospective
 - Policy review and formulation
 - Education and training

Ethical Decision-making

- Identify ethical issues: Conflicting values and duties.
- Identify individuals, groups, organizations likely to be affected by decision.
- Tentatively identify all possible courses of action and participants involved in each, along with possible benefits and risks.

Ethical Decision-making (cont'd)

- Examine reasons for and against each possible course of action, considering:
 - Ethical theories, principles, guidelines
 - Codes of ethics
 - Practice standards in the profession
 - Legal principles
 - Social work practice theory and principle
 - Personal values (religious, cultural, ethnic, political)
 - Agency policies, regulations

Ethical Decision-making (cont'd)

- Consult with colleagues and appropriate experts (e.g., agency staff, supervisors, administrators, attorneys, ethics experts)
- Make decision and document decision-making process
- Monitor, evaluate and document decisions

Recognizing Ethical Dilemmas:
The Nature of “Inattentional Blindness”

<http://www.npr.org/2011/06/20/137086464/why-seeing-the-unexpected-is-often-not-believing>

This presentation draws on:

- Frederic G. Reamer, *Risk Management in Social Work: Preventing Professional Malpractice, Liability, and Disciplinary Action*. New York: Columbia University Press, 2015.
- Frederic G. Reamer, *The Social Work Ethics Casebook: Cases and Commentary*. Washington, DC: NASW Press, 2009.
- Frederic G. Reamer, *Ethical Standards in Social Work*, 2nd ed. Washington, DC: NASW Press, 2006.
- Frederic G. Reamer, *Boundary Issues and Dual Relationships in the Human Services*. New York: Columbia University Press, 2012.
- Frederic G. Reamer, *Social Work Values and Ethics*, 4th ed. New York: Columbia University Press, 2013.
- Frederic G. Reamer, *The Social Work Ethics Audit: A Risk-management Tool*. Washington, DC: NASW Press, 2001.
